No. 163

In the Supreme Court of the United States

OCTOBER TERM, 1955

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

FROZEN FOOD EXPRESS ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

STATEMENT AS TO JURISDICTION

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CASES CITED

345993—55——1

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STATEMENT AS TO JURISDICTION

The Interstate Commerce Commission, appellant, submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas is reported at 128 F. Supp. 374, and a copy is attached hereto as Appendix A. The final judgment of the District Court, dated February 25, 1955, is attached hereto as Appendix B. The decision of the Interstate Commerce Commission is reported at 62 M. C. C. 646.

BASIS OF JURISDICTION

This suit was brought by Frozen Food Express, a motor common carrier of property, to set aside and enjoin an order of the Interstate Commerce Commission entered under section 204 (c) of the Interstate Commerce Act, 49 U. S. C. 304 (c). The order directed Frozen Food Express to cease and desist from engaging in certain interstate operations and transportation unless and until duly authorized by the Commission. The judgment of of the district court was entered on February 25, 1955, and notice of appeal was filed in that court by the Commission on April 20, 1955.

The jurisdiction of the Supreme Court to review the decision of the district court on direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b), and is sustained by the following cases: *United States* v. *Pierce Auto Freight Lines,* 327 U. S. 515; *Interstate Commerce Commission* v. *Parker,* 326 U. S. 60; *American Trucking Assn.* v. *United States,* 344 U. S. 298; *United States* v. *Capital Transit Co.,* 338 U. S. 286.

STATUTES INVOLVED

The pertinent portions of Part II of the Interstate Commerce Act, 49 U. S. C. 301 et seq., are as follows:

> *Sec. 203 (b) (6), 49 U. S. C. 303 (b) (6):*
> Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees

and safety of operation or standards of equipment, shall be construed to include * * * (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), *agricultural* (including horticultural) *commodities (not including manufactured products thereof)*, if such motor vehicles are not used in carrying any other property, or passengers, for compensation * * *. [Emphasis added.]

Sec. 204 (c), 49 U. S. C. 304 (c): Upon complaint in writing to the Commission by any person, * * * the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. * * *

Sec. 206 (a), 49 U. S. C. 306 (a): * * * no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway * * *, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: * * *

QUESTIONS PRESENTED

The questions presented by this appeal are as follows:

(1) Whether the district court, in deciding as a "mixed question of law and fact" that both fresh dressed poultry and frozen dressed poultry are "agricultural commodities" within the exemption of section 203 (b) (6) of the Interstate Commerce Act, and thereby completely disregarding the Commission's contrary findings based on substantial evidence, erroneously usurped the Commission's function and invaded its province as the fact finding body; and

(2) Whether, in setting aside and enjoining enforcement of the Commission's order insofar as it relates to fresh and frozen dressed poultry, the district court erroneously disregarded or acted contrary to the principle of judicial review prescribed by this Court to the effect that an order of the Commission must be sustained by a reviewing court if within the scope of a statute the Commission is authorized to administer and enforce and if based upon adequate findings supported by substantial evidence on the whole record.

STATEMENT OF THE CASE

The administrative proceeding which gave rise to the Commission order here involved was initiated by the filing with the Commission of a complaint by three motor common carriers, com-

petitors of Frozen Food Express, alleging that the latter was engaged in transporting in interstate commerce for compensation certain commodities, i. e., fresh and frozen meats, and fresh and frozen dressed poultry, to, from, and between points and places it was not authorized to serve.[1] Frozen Food Express admitted that it was performing the described transportation, but contended no operating authority therefor was required, relying upon the exemption provided by section 203 (b) (6) of the Interstate Commerce Act.

In lieu of a formal hearing, the parties stipulated the facts, including in considerable detail the facts as to the steps taken in converting livestock into "fresh and frozen meats" and converting live poultry into "fresh and frozen dressed poultry". Following submission of the matter on the stipulated facts and on briefs of the respective parties, the Commission made its report, finding that neither fresh meat nor frozen meat was "livestock" and that neither fresh nor frozen dressed poultry was an unmanufactured "agricultural commodity" within the exemption of section 203 (b) (6); consequently that in transporting the said commodities Frozen Food Express was

[1] The record shows that Frozen Food Express holds certificates of public convenience and necessity issued by the Commission, authorizing it to transport the named commodities to, from, and between points in a number of States, but not those named in the complaint proceeding.

operating without authority and in violation of the Act.[2] The Commission thereupon issued the cease-and-desist order which is the order sought to be set aside in the suit brought by Frozen Food Express.

The district court, in an opinion which covered this and a companion suit by Frozen Food Express involving a different but closely related question,[3] upheld the Commission's order insofar as it involves fresh and frozen meats, but set aside and enjoined enforcement of the order insofar as it relates to fresh and frozen dressed poultry. The court held as a matter of law that both types of dressed poultry are "agricultural commodities" and not "manufactured products thereof" within the meaning of section 203 (b) (6), and therefore that no operating authority is required in order for Frozen Food Express lawfully to transport them or either of them. It is from that holding by the district court that this appeal is taken.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

That part of the district court's opinion which deals with this case commences at page 379 of 128 F. Supp., under the heading "Civil Action 8396". There, after disposing of a procedural

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[2] Section 206 (a) of the Interstate Commerce Act, *supra*.

[3] Appeals to this Court have been taken by Frozen Food Express, by the Commission, and by other parties, from the judgment entered in the companion suit.

question not involved in this appeal, the court stated that as to both fresh and frozen dressed poultry it agreed with the conclusion reached by the district judge in *Interstate Commerce Commission* v. *Kroblin*, 113 F. Supp. 599, aff'd., 212 F. 2d 555, cert. den., 348 U. S. 836,[4] to the effect that dressed poultry is an "agricultural commodity" and not a "manufactured product thereof."

It should be noted at this point that the only commodity involved and passed upon in the Kroblin case was *fresh* dressed poultry. There was no showing that Kroblin was transporting *frozen* dressed poultry. The Texas court in the instant case, while purporting to follow the Iowa court in *Kroblin*, actually went beyond that court in holding that frozen as well as fresh dressed poultry was within the statutory exemption. It is obvious that, as to frozen dressed poultry, the *Kroblin* case was not and is not a precedent for the decision in the instant case; this for the reason that the freezing of many articles of food is generally recognized as a manufacturing process whereby the quality and nature of the

[4] The *Kroblin* decision is not necessarily controlling of the issue here involved, this Court having many times held that denial of a petition for certiorari imports nothing as to the merits of a lower court decision. *Griffin* v. *United States*, 336 U. S. 704, 716; *Sunal* v. *Large*, 332 U. S. 174, 181; *Brown* v. *Allen*, 344 U. S. 443, 456; *Illouse* v. *Mayo*, 324 U. S. 42, 47, and cases there cited.

article is changed materially from that of its fresh, unfrozen state. That is to say, freezing (or "quick-freezing" as it is sometimes called) may constitute "manufacturing" even if the antecedent processing does not.

The real and substantial question, however, is whether the district court erred in holding that fresh and frozen dressed poultry are unmanufactured agricultural commodities, in complete disregard for the Commission's findings, based upon substantial, uncontradicted evidence, that both types of poultry have been so changed from their natural state as to acquire "new forms, qualities, properties, or combinations" (62 M. C. C., at p. 650), and therefore are not "agricultural commodities" within the meaning of section 203 (b) (6). The Commission's report (62 M. C. C., at 649–650) summarizes in detail the numerous steps taken and the methods involved in the factory-converting of live poultry into fresh and frozen[5] dressed poultry, and also showing that the opinions of many experts on the subject, largely as indicated by official Government publications, were to the effect that the dressing of

[5] As to the freezing, for example, the report (after describing the slaughtering and dressing processes) states: "The freezing of poultry must be accomplished as rapidly as possible and is generally done in a mechanically refrigerated room in which the temperature is maintained at minus 40° Fahrenheit and the air is circulated at speeds up to 70 miles an hour. After the birds have been frozen by this quick-freeze method, they are placed in cold storage until ready for shipment." 62 M. C. C., at p. 649.

poultry is and long has been classified and considered as manufacturing, and dressed poultry as a manufactured food or product.

As already stated, the district court completely disregarded the Commission's findings of fact, based upon substantial, undisputed evidence, and substituted therefor its own views, unsupported by evidence. This action was completely contrary to fundamental principles of judicial review long ago prescribed by the Supreme Court and consistently followed ever since. *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 547; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 139; *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 488.

If the decision of the district court in this case is permitted to stand, the function of the Commission as the fact finding, evidence-weighing body, in matters within the scope of its authority, will have been taken over by the district court. This Court's oft-repeated statement that "the findings of the Commission are made by law *prima facie* true [and this] Court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience" (*Illinois C. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441) will have become meaningless, at least as applied to the instant case, if the holding of the district court is not reversed.

If "there is a presumption that the Commission has properly performed its official duties, and this presumption supports its official acts" (*Nor-*

folk Southern R. Corp. v. *United States*, 96 F. Supp. 756, 761; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602), the district court should not so lightly have cast aside the Commission's findings and conclusions and substituted itself as the fact-finding body. And even if the district court was correct in holding that the question to be decided was "a mixed one of law and fact, calling for the application of the processes of legal reasoning and of principles of statutory construction" (128 F. Supp., at 380), this Court has said, with respect to legal conclusions drawn by the Commission:

> As conclusions of law, these do not have the same claim to finality as do the findings of fact made by the Commission. However, in the light of the Commission's long record of practical experience with this subject and its responsibility for administration and enforcement of this law, these conclusions are entitled to special consideration.[6]

For these reasons, therefore, the question presented by this appeal is of substantial importance to the Commission in the performance of the administrative and quasi-judicial duties imposed upon it by the Congress. In order properly to perform its duties the Commission needs to know the scope and extent of its authority to decide complaint cases of the type here involved. It needs to know whether such cases may be decided

[6] *Levinson* v. *Spector Motor Co.*, 330 U. S. 649, 672.

de novo by reviewing courts, in complete disregard for its own findings and conclusions, as, we submit, was done by the district court in this instance.

The question presented by this appeal is substantial also from the standpoint of the public, particularly from the standpoint of motor and rail carriers subject to regulation by the Commission, and to shippers of the considered commodities. Numerous motor carriers, several motor carrier associations, and many railroads intervened in this suit in the district court, in support of the Commission's order, and they too have filed their appeals to the Supreme Court from the district court's decision. Their views on the questions involved, the extent of their several interests, and the disastrous results to them of the district court's holding, will doubtless be fully explained in their respective Statements as to Jurisdiction. We would point out, however, a few facts so well known as to require no proof.

One of these facts is that during the 20 years Federal regulation of interstate motor transportation has been in effect, the Commission has issued certificates and permits to hundreds of motor carriers, authorizing them to engage in the for-hire transportation of fresh and or frozen dressed poultry in interstate commerce. The carriers so authorized have invested large sums of money in acquiring operating rights, special-type refrigerated trucks, and other special equipment

necessary for performing the described transportation. They have built up substantial and highly specialized businesses in this type of transportation, which differs in many respects from motor carrier service devoted to transportation of general freight. The value of the certificates held by these motor carriers will be greatly reduced, and the carriers' special-type vehicles and other equipment will be to a large extent rendered useless to them, if the decision of the district court is permitted to stand, to the effect that the transportation of both fresh and frozen dressed poultry is exempt from regulation.

Another and perhaps more serious factor worthy of consideration is that if this already large and constantly growing segment of interstate transportation should suddenly be freed from regulation, after having been regulated by the Commission for so long, the result would necessarily be "wild-cat" operations by truckers who do not carry the insurance which regulated motor carriers are required to maintain[7] for the protection of shippers and the general public, as well as rate-cutting and every conceivable type of unfair and destructive competition, contrary to the National Transportation Policy declared by Congress.[8] Such transportation by motor car-

[7] Section 215 of the Interstate Commerce Act, 49 U. S. C. 315.

[8] Preceding section 1 of the Interstate Commerce Act, 49 U. S. C. 1.

riers without being required to publish, file, and observe tariffs would disastrously affect rail carriers as well as regulated motor carriers. It is easy to see, also, how shippers of dressed poultry would suffer from de-regulation of this type of transportation, as they doubtless would receive less dependable and otherwise inferior service, at uncertain, and constantly changing, rate levels.

What has been ~~said above as~~ to the effect of the district court's decision in now removing the transportation of dressed poultry from regulation, after it has been so long regulated by the Commission, is reinforced by the well-known rule stated as follows in *Interstate Commerce Commission* v. *Weldon*, 90 F. Supp. 873, 877, aff'd, 188 F. 2d 367, cert. den., 342 U. S. 827:

> The contemporaneous constructions placed upon the provisions of the Interstate Commerce Act by the Commission, which possesses special competence in this field, are entitled to great weight and respect and will not be overturned unless they are arbitrary or plainly erroneous. *New York, N. H. & Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 402; *Brewster* v. *Gage, Collector of Int. Revenue*, 280 U. S. 327, 336.

The district court gave no effect whatsoever to this well-established rule of construction. It gave no weight to the Commission's interpretation of the statute, just as it ignored or gave no

credence to the Commission's findings. The decision was, therefore, directly in the face of the doctrine of administrative finality long ago prescribed and consistently followed by this Court.

CONCLUSION

It is earnestly submitted that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted.

LEO H. POU,
Associate General Counsel,
Interstate Commerce Commission.

APPENDIX A

In the District Court of the United States for the Southern District of Texas, Houston Division

Civil Action No. 8285 and Civil Action No. 8396

FROZEN FOOD EXPRESS, PLAINTIFF, EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, INTERVENING PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS, COMMON CARRIER IRREGULAR ROUTE CONFERENCE OF AMERICAN TRUCKING ASSOCIATION, ET AL., INTERVENING DEFENDANTS

JANUARY 26, 1955

Before HUTCHESON, *Chief Circuit Judge*, and CONNALLY and KENNERLY, *District Judges*

CONNALLY, *District Judge:*

Filed pursuant to Secs. 1336, 1398, and 2321–2325, of Title 28; to Sec. 1009, of Title 5; and to Sec. 305 (g), of Title 49, U. S. C. A., each of the foregoing civil actions attacks and seeks to restrain enforcement of an order of the Interstate Commerce Commission. Presenting the same question of law, and substantial identity of parties, the actions were consolidated for hearing and trial. The question for determination is whether a number of different commodities, as

later noted herein, all of which have their origin on the farm or ranch, fall within the scope of the so-called agricultural exemption (Sec. 203 (b) (6)) of Part II of the Interstate Commerce Act. (Title 49, U. S. C. A., Sec. 301, et seq.). By terms of the last-mentioned statute, motor vehicles used in carrying property consisting of "ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)", are exempt from Interstate Commerce Commission control (save for minor exceptions not here pertinent). The plaintiff in each of the consolidated actions, being a trucking concern holding a certificate of convenience and necessity from the Commission, desires to carry some or all of the commodities in question, unrestricted by the terms of its own certificate, or by other Commission regulation. Hence the plaintiff, supported to a considerable extent in this contention by the Secretary of Agriculture of the United States, urges upon the Court a broad interpretation of the statutory language "agricultural commodities (not including manufactured products thereof)", which would have the net result of enlarging this so-called agricultural exemption. The Commission, on the other hand, and those intervenors who align themselves with the Commission, urge upon us that most of the commodities in question, by virtue of the treatment and processing which they receive, either have lost their identity as "agricultural commodities", or have become "manufactured products thereof". The result of this argument is drastically to restrict the scope of the exemption.

In June 1948, the Interstate Commerce Commission, of its own motion, instituted a proceeding, being MC C-968 on its docket, in the nature of an investigation, to determine the meaning and scope of the term "agricultural commodities (not including manufactured products thereof)", as used in the above-mentioned statute. The proceeding was widely noticed in the affected trades and industries. Many interested parties, including the Secretary of Agriculture of the United States, the Commissioners of Agriculture from a number of the States, associations of shippers, motor carriers, and others, intervened. After extended hearings, during which much expert testimony was offered as to the manner and method of cleaning, preparing, packaging, and otherwise processing the various commodities in question, the Commission issued its report and order entitled "Determination of Exempted Agricultural Commodities" (52 I. C. C. Reports, Motor Carrier Cases, 511–566). In such report, the Commission announced its definition of such statutory term,[1] which definition it then undertook to apply to the

[1] "In No. MC–C–968, we find that the term 'agricultural commodities (not including manufactured products thereof)' as used in section 203 (b) (6) of the Interstate Commerce Act means: Products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits, and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live poultry, and bees (such as milk, wool, eggs, and honey), but not including any such products or commodities which, as a result of some treatment, have been so changed as to possess new forms, qualities, or properties, or result in combinations."

various commodities under consideration, and enumerated those which it found to come within the statutory language, and those which it found to fall without.[2] Thereupon, the proceeding was terminated and removed from the Commission docket.

The plaintiff Frozen Food Express was not a party to the proceeding before the Commission.

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[2] "We find that the term 'agricultural commodities (not including manufactured products thereof)' as used in section 203 (b) (6) includes: (1) fruits, berries, and vegetables which remain in their natural state, including those packaged in bags or other containers, but excluding those placed in hermetically sealed containers, those frozen or quick frozen, and those shelled, sliced, shredded, or chopped up; (2) fruits, berries, and vegetables dried naturally or artificially; (3) seeds, including inoculated seeds, but not seeds prepared for condiment use or those which have been deawned, scarified or otherwise treated for seeding purposes; (4) forage, hay, straw, corn and sorghum fodder, corn cobs, and stover; (5) (a) hops and castor beans, and (b) leaf tobacco, but excluding redried tobacco leaf; (6) raw peanuts, and other nuts, unshelled; (7) whole grains, namely, wheat, rye, corn, rice, oats, barley and sorghum grain, not including dehulled rice and oats, or pearled barley; (8) (a) cotton in bales or in the seed, (b) cottonseed and flaxseed, and (c) ramie fiber, flax fiber, and hemp fiber; (9) live poultry, namely, chickens, turkeys, ducks, geese, and guineas; (10) milk, cream, and skim milk, including that which has been pasteurized, standardized milk, homogenized milk and cream, vitamin 'D' milk, and vitamin 'D' skim milk; (11) wool and mohair, excluding cleaned and scoured wool and mohair; (12) eggs, including oiled eggs, but excluding whole or shelled eggs, frozen or dried eggs, frozen or dried egg yolks, and frozen or dried egg albumin; (13) (a) trees which have been felled and those trimmed, cut to length, peeled or split, but not further processed, and (b) crude resin, maple sap, bark, leaves, Spanish moss, and greenery; (14) sugar cane, sugar beets, honey in the comb, and strained honey."

By amended complaint filed here July 12, 1954, plaintiff alleges that it desires to carry agricultural commodities (not including manufactured products thereof) for hire, to and from all points within the United States, irrespective of the limitations imposed by its own certificate; that the report of April 13, 1951, deprives plaintiff of its right to do so. Alleging that the action of the Commission, in entering the report in question, was arbitrary, capricious and unreasonable, that it constituted an abuse of discretion and a violation of the Commission's statutory powers, the plaintiff here seeks an injunction to restrain the Commission and the United States from enforcing or recognizing the validity of such report; restraining interference with the plaintiff's proposed transportation of such agricultural commodities (not including manufactured products thereof), and seeks an order of this Court declaring the report of the Commission of April 13, 1951, to be null and void.

The Secretary of Agriculture has intervened, denominating himself "Intervening Plaintiff." He makes common cause with plaintiff in contending that a number of commodities are within the exemption. Several trucking associations, and some sixty southern and western railroad companies, have intervened. These interveners take

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[2] "(1) Slaughtered meat animals and fresh meats; (2) Dressed and cut-up poultry, fresh or frozen; (3) Feathers; (4) Raw shelled peanuts and raw shelled nuts; (5) Hay chopped up fine; (6) Cotton linters and cottonseed hulls; (7) Frozen cream, frozen skim milk, and frozen milk; (8) Seeds which have been dewinged, scarified, or inoculated."

a contrary view, and support the report of the Interstate Commerce Commission.

We are of the opinion that the action may not be maintained, and must be dismissed, for the reason that the report and order of the Interstate Commerce Commission of April 13, 1951, is not an "order" subject to judicial review under any of the statutes cited. The proceeding before the Commission was not an adversary one. The order which initiated it purported to do no more than direct that an investigation be made of the meaning of the statutory language. Notice was given only to the public. When the final report and order was forthcoming some two years later, the only "order" entered was one discontinuing the proceeding and removing it from the Commission's docket. The question is controlled by *U. S.* v. *Los Angeles R. R. Co.* (273 U. S. 284), holding a very similar "order" of the Interstate Commerce Commission which found, after an investigation, the value of certain railroad properties, not to be subject to review. The language of Mr. Justice Brandeis, speaking for a unanimous Court there, aptly describes the order in issue here;

> The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclu-

> sions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation.

The proponents of jurisdiction here rely upon *Columbia Broadcasting System* v. *U. S.* (316 U. S. 407). It was there held that an order of the Federal Communications Commission promulgating certain rules and regulations requiring that the Commission deny a license to broadcasting stations under certain circumstances, was subject to judicial review, upon a showing by the complaining party of strong equitable considerations. This authority is clearly distinguishable from the present case. The order there in question was entered in the exercise of the agency's rule-making power. Such orders, together with those fixing rates and those determining controversies before the administrative body, have long been recognized as subject to review (*U. S.* v. *Los Angeles R. R. Co., supra*).

Likewise, the complaining party there showed an immediate and continuing threat of irreparable injury if the order were not reviewed. It is not so here. The statement of plaintiff that it desires to carry for hire most or all of the commodities on the Commission's proscribed list, and that if it does so, the Commission likely will seek injunctive relief to restrain plaintiff, shows no basis for the intervention of a court of equity. Plaintiff will have an adequate remedy in the event of such interference.

It follows that Civil Action 8285 will be dismissed.

Civil Action 8396

A complaint was filed December 23, 1953, with the Interstate Commerce Commission by East Texas Motor Freight Lines, Gillette Motor Transport, Inc., and Jones Truck Lines, Inc., charging that Frozen Food Express was and has been engaged in transporting fresh and frozen dressed poultry, and fresh and frozen meats, and meat products, for hire, between points in interstate commerce not authorized by its certificate of convenience and necessity. Frozen Food readily admitted that it had been so engaged; but defended on the theory that such products all were within the agricultural exemption. The Commission found each of these products not to be within the exemption, and ordered Frozen Food Express to cease and desist from such unauthorized transportation. The present proceeding was filed by Frozen Food Express to review that order.[3]

While the present action was pending in this Court, the Secretary of Agriculture of the United States filed with the Commission his petition for leave to intervene, pursuant to Sec. 1291, of Title 7, U. S. C. A. This request was denied; and the Secretary appears here as "Intervening Plaintiff," contending (1) that the proceedings before the Commission were null and void by reason of the failure of the Commission to notify him of the pendency thereof (Sec. 1291 (a), of Title 7, U. S. C. A.); (2) that the proceedings should be remanded to the Commission by reason of its

[3] Plaintiff has abandoned the contention that meat products are within the agricultural exemption, and this commodity will not be further considered here.

error of law in having denied him leave to intervene; and (3) that the cease and desist order should be enjoined by reason of the alleged error of the Commission in holding fresh and frozen meats, and fresh and frozen dressed poultry, to be beyond the limits of the agricultural exemption.

The rail carriers and trucking associations which intervened in Civil Action 8285, also appear in this action. They support the Commission, and oppose the position taken by the plaintiff and the Secretary of Agriculture.

Armour & Company, being engaged at various points in the United States in the slaughter of livestock and the killing, dressing, and sale of poultry, has intervened, urging that dressed poultry is an exempt commodity, that meat is not.

The position taken by the Secretary of Agriculture that the proceeding before the Commission was null and void in its entirety by reason of the failure of the Commission to give him notice thereof, need not long detain us. The proceeding there was not one with respect to "rates, charges, tariffs, and practices" relating to the transportation of farm products, and hence was not one of which the Secretary was entitled to notice under the statute (Secs. 1291 and 1622, of Title 7, U. S. C. A.). *U. S.* v. *Pa. R. R. Co.* (242 U. S. 208); *B. & O. R. R. Co.* v. *U. S.* (277 U. S. 292); *Mo. Pac. R. R. Co.* v. *Norwood* (283 U. S. 249). The Commission likewise did not commit an error of law in denying the Secretary's Petition of Intervention, filed there while the present proceeding was pending here.

Most able and exhaustive treatment is given the question now before us, in so far as it concerns

dressed poultry, by Judge Graven of the United States District Court for the Northern District of Iowa, in *I. C. C.* v. *Krobliń* (113 F. Supp. 599, aff., 212 F. 2d 555, cert. den., Oct. 14, 1954). Reviewing the long struggle between the Interstate Commerce Commission in its efforts to restrict the application of the exemption in question, and the Department of Agriculture and others in seeking to expand it; reviewing the legislative history of the Motor Carrier Act of 1935, and various proposed amendments thereto; and considering the congressional intent which prompted the insertion of the agricultural exemption, Judge Graven concluded that dressed poultry constituted an "agricultural commodity," and did not constitute a "manufactured product thereof." Hence, such commodity was within the exemption. It is sufficient to state that we agree with those conclusions as to fresh and frozen dressed poultry.

Counsel for the Commission urges that this Court should disregard the *Krobliń* case, on the argument that the only question before us is one of the adequacy of the evidence before the Commission. It is said that the order which was entered was one within the general purview of the Commission's authority, and that if its findings are supported by "substantial evidence," this Court has no alternative but to leave it undisturbed. While we do not quarrel with such statement as a general proposition of law, the argument is not convincing in its application to the present record. The primary facts before the Commission were without dispute and were the subject of stipulation. Reduced to simplest form,

they showed that before a chicken or duck became "dressed poultry", the bird was killed; his feathers and entrails removed, he was chilled, and in some cases frozen, packaged, etc. In addition, such "facts" consisted of evidence of so-called "expert" nature, that this treatment or processing of the chicken or duck rendered him a "manufactured product."

It is apparent that there is only one ultimate finding called for, namely, whether under the type of processing reflected by the record, the product falls within the statutory definition. The question then is a mixed one of law and fact, calling for the application of the processes of legal reasoning and of principles of statutory construction. The fact that the Commission's findings are supported by an "expert" who gives his opinion that a dressed chicken is a manufactured product, does not foreclose the question, nor remove it from the scope of judicial review. *Baumgartner* v. *U. S.* (322 U. S. 665); *Lehmann* v. *Acheson* (206 F. 2d 392, 3C); *Galena Oaks Corp.* v. *Scofield* (—— F. 2d ——, 5C, Dec. 29, 1954, as yet unreported).

In our opinion, fresh and frozen meat does not fall within the category either of "ordinary livestock" or of "agricultural commodities", and hence is not within the exemption. Since the enactment of Part II of the Interstate Commerce Act in 1935, motor vehicles used exclusively in carrying "livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof)", have been exempt. By amendment in 1940, the term "ordinary" was inserted immediately before the word "livestock".

The term "ordinary livestock" is defined in Sec. 20 (11) of the Act as "all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses".

Referring only to the live animals, "ordinary livestock" may not be tortured to include the carcasses of slaughtered meat animals, or the meat which is the product of butchering. Meat has been regarded generally in the industry as a controlled commodity for some twenty years. Congress has dealt with the agricultural exemption on many occasions. Considering the ease with which the Congress might have added appropriate language to evidence its intent to exempt fresh or frozen meat from Interstate Commerce Commission control, if it so desired, the absence of such language indicates that no such intent was entertained.

Nor may meat, fresh or frozen, be considered an "agricultural commodity" for present purposes. The exemption has treated the live meat animal in a separate generic class from "agricultural commodity" since the enactment of the statute; and if the live animal, on entering the slaughter pen or the packing house, is not an "agricultural commodity", we are unable to see how he becomes one on emerging therefrom in the form of beef or pork. The Commission was correct, in our opinion, in holding fresh and frozen meat to be nonexempt.

The enforcement of the order of the Interstate Commerce Commission, MC-C-1605, *East Texas Motor Freight Lines, Inc., et al. v. Frozen Food Express*, is enjoined and restrained in so far as

said order interfered with, enjoins or restrains the plaintiff Frozen Food Express from transporting fresh and frozen dressed poultry in interstate commerce (when the motor vehicles used in carrying such poultry are not used for carrying any other property or passengers for compensation). Other relief sought by plaintiff is denied.

Clerk will notify counsel.

Done at Houston, Texas, this 26th day of January 1955.

(S) JOSEPH C. HUTCHESON, JR.,
Chief Judge, Fifth Circuit,

(S) BEN C. CONNALLY,
United States District Judge;

(S) THOMAS M. KENNERLY,
United States District Judge,
Concurring in Part and Dissenting in Part.

KENNERLY, *District Judge:* Concurring in part and dissenting in part.

I concur with all the foregoing opinion except the decision in Civil Action 8396 with respect to fresh meat and frozen meat. As to that I respectfully dissent.

I think all of Section 303 (b) should be given a broad and liberal construction, and that Section 303 (b) (6) should be construed as including fresh meat and frozen meat. I think we should not only follow the reasoning of both the District Court and Court of Appeals in the *Kroblin* case with respect to dressed poultry and frozen dressed poultry, but that what is said is also applicable to fresh meats and frozen meats.

(S) T. M. KENNERLY,
Judge.

APPENDIX B

In the United States District Court, Southern District of Texas, Houston Division

Civil Action No. 8396

FROZEN FOOD EXPRESS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., DEFENDANTS

JUDGEMENT

This action, to enjoin and set aside an order of the Interstate Commerce Commission, having come on for final hearing on November 16, 1954, before a duly constituted three-judge District Court; convened pursuant to Sections 2284 and 2321–2325, Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence, and the briefs and arguments of counsel for the respective parties, and being fully advised in the premises; and having on January 26, 1955, filed herein its opinion, containing its findings of fact and conclusions of law; now, in accordance with the said opinion, findings, and conclusions, it is hereby ordered, adjudged, and decreed as follows:

(1) The defendants, the United States of America and the Interstate Commerce Commission, be, and they hereby are, enjoined and restrained from enforcing the order of the said Commission entered July 13, 1954, in a proceed-

ing docketed by the Commission as No. MC-C-1695, and entitled "East Texas Motor Freight Lines, Inc., et al. *v.* Frozen Food Express", insofar as the said order requires the said Frozen Food Express to cease and desist from transporting, or interferes with its transportation of, fresh and frozen dressed poultry in interstate commerce for compensation unless the motor vehicle used in the carrying of such poultry is at the same time being used to carry for compensation passengers or other property not within the exemption provided in section 203 (b) (6) of the Interstate Commerce Act (49 U. S. C. 303 (b) (6)); and

(2) All other relief sought by the plaintiffs herein, including the Secretary of Agriculture as intervening plaintiff, be, and the same hereby is, denied.

This the 23d day of February 1955.

(S) JOSEPH C. HUTCHESON, JR.,
Chief Judge, United States Court of Appeals for the Fifth Circuit.

(S) THOMAS M. KENNERLY,
United States District Judge.

(S) BEN C. CONNALLY,
United States District Judge.

U. S. GOVERNMENT PRINTING OFFICE: 1960